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Geoffrey R. Watson

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PROGRESS FOR PILGRIMS? AN ANALYSIS OF THE HOLY SEE-ISRAEL FUNDAMENTAL AGREEMENT

Geoffrey R. Watson*

The approach of the millennium is expected to draw unprecedented numbers of Christian pilgrims to the Holy Land. Pope John Paul II has proclaimed the year 2000 a Jubilee Year, and he has issued an Apostolic Letter encouraging Catholics to participate by making pilgrimages to Israel and Rome. Indeed, the Pope has announced that he intends to visit the Holy Land before the end of the century.¹ During normal years, more than two million Christian tourists visit Israel; in the year 2000, five to fifteen million tourists, mostly Christian, are expected to visit Israel.² Among other things, Christian pilgrims will want to visit the Church of the Holy Sepulcher; to see Nazareth, where Jesus grew up; and to make a pilgrimage to Christ's birthplace, Bethlehem, 2000 years after His birth.³

Yet as Professor Moshe Hirsch noted in his remarks at this Symposium,⁴ the 1993 Fundamental Agreement⁵ between the Holy See and Is-

* Visiting Associate Professor of Law, The Catholic University of America, Columbus School of Law, Washington, D.C. I would like to thank Professors Marshall Breger and Lucia Silecchia for their helpful comments on an earlier draft.

1. See *Pope Wants to Visit Before 2000*, JERUSALEM POST, Feb. 4, 1997, at 1, available in 1997 WL 7948466. The Vatican itself expects as many as 30 to 50 million Christian pilgrims to visit Rome in the year 2000, a substantial increase over normal years. See Bruce Johnston & Robert Fox, *Papal Visit to Brazil Hailed as a Triumph*, DAILY TELEGRAPH (London), Oct. 8, 1997, at 15.

More than 40 million Catholics are expected to travel to major sites of pilgrimage in the Jubilee Year of 2000, principally Jerusalem, Rome, Santiago de Compostella and Assisi. Millions are expected to visit Lourdes and Fátima, the sites of apparitions of the Virgin Mary.

Rome is preparing to receive up to 10 million pilgrims at each of the great festivals of the Jubilee Year, and more than 50 million during the year as a whole.

Id.

2. See Sue Fishkoff, *Apocalypse Soon?*, JERUSALEM POST, Apr. 4, 1997, at 19, available in 1997 WL 7951612.

3. Many scholars contend that Jesus actually was born in the year 4 B.C., and one Christian group held its millennium celebration in 1996. See *id.* at 19.

4. See Moshe Hirsch, Address at Symposium, The Fundamental Agreement Between the Holy See and the State of Israel: A Third Anniversary Perspective (Apr. 8, 1997) (transcript on file with the *Catholic University Law Review*).

5. Fundamental Agreement Between the Holy See and the State of Israel, Dec. 30, 1993, Vatican-Isr., 33 I.L.M. 153 (1994) [hereinafter Fundamental Agreement].

rael "stops short of formally recognizing a legal right of [religious] pilgrimage."⁶ The Agreement provides only that the Holy See and Israel "have an interest in favouring Christian pilgrimages to the Holy Land."⁷ It does not explicitly acknowledge an individual right to pilgrimage, and it imposes no duty on the Holy See or Israel to admit pilgrims or to facilitate pilgrimage.

This Article asks whether international human rights law obliges states to admit foreign pilgrims, and if so, whether the existence of such an obligation should influence interpretation of the Fundamental Agreement. Part I of this Article takes up a logically prior question: whether the Fundamental Agreement is a legally binding treaty, and whether it should be interpreted in accordance with treaty law. The Article rejects recent suggestions that one or both parties lack the capacity to make treaties, and it concludes that the Agreement is a binding treaty that should be interpreted in accordance with the Vienna Convention on the Law of Treaties.

Part II suggests that human rights instruments have been surprisingly slow to recognize a right of international pilgrimage. There is some state practice that might reflect the existence of a right of international pilgrimage and a correlative duty to accept foreign pilgrims, but it is not clear that this practice arises out of a sense of legal obligation. This Part concludes that there is at most an emerging customary law right of pilgrimage, and that this right would be subject to reasonable restrictions relating to health, safety, and security, as well as restrictions designed to protect holy places themselves. Because the background law on pilgrimage is not well settled, that law should not directly affect interpretation of the Fundamental Agreement.

Finally, Part III of this Article observes that human rights law does not prevent states from undertaking an obligation to admit pilgrims. If pilgrimage continues to grow, states someday may have to establish rules and quotas regulating the flow of pilgrimage, similar to those established by Saudi Arabia to regulate the Muslim *Hajj*. Ironically, the regulation of pilgrimage itself may spur recognition of pilgrimage as a human right.

6. Hirsch, *supra* note 4, at 14.

7. Fundamental Agreement, *supra* note 5, art. 5, para. 1, at 156.

I. THE NATURE OF THE FUNDAMENTAL AGREEMENT

Is the Fundamental Agreement a treaty? This question is important because the answer determines whether the instrument is legally binding and how it will be interpreted. The Vienna Convention on the Law of Treaties⁸ defines a treaty as an international agreement "between States" that is "governed by international law."⁹ The Fundamental Agreement clearly is "governed" by "law." The final clauses of the agreement provide for its "entry into force,"¹⁰ and the operative provisions of the agreement contain terms of obligation such as "shall" and "affirms."¹¹ Moreover, the agreement appears to be governed by international law, not domestic law. As is typical of treaties, the agreement makes no reference to any governing domestic law. More significantly, the Fundamental Agreement is subject to ratification, which is a common characteristic of a treaty.¹² The parties' use of the term "fundamental agreement" rather than "treaty" is of little consequence; under the Vienna Convention, a treaty does not require any "particular designation."¹³

But is the Fundamental Agreement an agreement "between states?" The answer to this question seems to be obvious: both parties are widely recognized as states, and they participate in treaties and international organizations only open to states. Even so, each party's claim to statehood has been challenged in recent times. Some states still refuse to acknowledge the State of Israel. Iraq, for example, continues to refer to Israel as the "Zionist entity."¹⁴ And some commentators still refuse to acknowledge the statehood of either the Holy See or the City of the Vatican.¹⁵

8. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

9. *Id.* art. 2, para. 1(a), at 333.

10. Fundamental Agreement, *supra* note 5, art. 15, at 158 (providing that the agreement will enter into force when ratified by both parties); *id.* art. 14, para. 2, at 158 (providing for exchange of diplomats after "entry into force" of the agreement).

11. See, e.g., *id.* art. 4, para. 1, at 155 (stating that Israel "affirms" its commitment to maintain the so-called "Status quo" in the Christian Holy Places); *id.* art. 4, para. 2, at 155 (stating that the foregoing provision "shall" apply notwithstanding any inconsistent article in the agreement); *id.* art. 6, at 156 (stating that Israel and the Holy See "reaffirm" the Catholic Church's right to maintain schools).

12. See *id.* art. 15, at 158.

13. Vienna Convention, *supra* note 8, art. 2, para. 1(a), at 333.

14. Cf. Louis Rene Beres & Yoash Tsiddon-Chatto, Opinion, *Osirak: 14 Years After*, JERUSALEM POST, June 7, 1995, at 6, available in 1995 WL 7558362 (stating that "Iraq has always insisted that a state of war exists with 'the Zionist entity'").

15. See, e.g., Yasmin Abdullah, Note, *The Holy See at United Nations Conferences: State or Church?*, 96 COLUM. L. REV. 1835, 1871-75 (1996) (arguing that the Holy See is

Israel is obviously a state. Israel clearly meets the traditional four-pronged test of statehood: a defined territory, a permanent population, a government, and the capacity to engage in foreign relations.¹⁶ Israel's border disputes are not inconsistent with its statehood; dozens of states have long-standing border disputes with their neighbors.¹⁷ Likewise, it is irrelevant that some states still have not recognized the State of Israel. Under the prevailing "declaratory" theory of statehood, recognition is not an element of statehood.¹⁸ In any event, Israel is now recognized by dozens of states and by its old nemesis, the Palestine Liberation Organization.¹⁹ Israel's membership in the United Nations is additional evidence of its statehood.²⁰ Israel is unquestionably a state.

The Holy See, for its part, clearly has the capacity to enter into treaties, regardless of whether it meets the technical definition of a state. The Holy See's treaty-making capacity clearly is recognized both in state practice and in the negotiating history of the Vienna Convention on the Law of Treaties. State practice on this question is quite compelling: the Holy See has become a party to dozens of treaties, bilateral and multilateral, and few, if any, states have objected to this practice. As for the Vienna Convention, its *travaux préparatoires* recognize that the Holy See is a "subject[] of international law" that "enters into treaties on the same basis as States."²¹ An early draft of the Vienna Convention would have extended its definition of a "treaty" to any international agreement between states or "other subjects of international law,"²² including the Holy

not a state).

16. See Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, art. 1, 49 Stat. 3097, 3100, 165 L.N.T.S. 19, 25 [hereinafter Montevideo Convention].

17. As Philip Jessup stated, "there must be some portion of the earth's surface which its people inhabit and over which its Government exercises authority. No one can deny that the State of Israel responds to this requirement." U.N. SCOR, 3d Sess., 383d mtg., at 9-12 (1948), reprinted in LOUIS HENKIN ET AL., INTERNATIONAL LAW 247 (3d ed. 1993) (remarks of U.S. Permanent Representative Philip C. Jessup) (arguing that Israel is a state).

18. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 202, reporters' note 1 (1987) [hereinafter RESTATEMENT] (discussing the preference for the "declaratory" theory of statehood).

19. See, e.g., Letter of Yasser Arafat to Yitzhak Rabin (Sept. 9, 1993) ("The PLO recognizes the right of the State of Israel to exist in peace and security."), in DAVID MAKOVSKY, MAKING PEACE WITH THE PLO 201 (1996).

20. Cf. U.N. CHARTER art. 4, para. 1 (opening membership in the United Nations to peace-loving "states"); HERMANN MOSLER, THE INTERNATIONAL SOCIETY AS A LEGAL COMMUNITY 60 (1980) ("[r]ecognition of a State . . . has now been substituted to a large extent, but not from all aspects, by admission to the United Nations.").

21. Draft Articles on the Law of Treaties, art. 1, para. 8, [1962] 2 Y.B. INT'L L. COMM'N 159, 162, U.N. Doc. A/CN.4/SER.A/1962/Add.1.

22. *Id.* art. 1, para. 1(a), at 161.

See. The final draft of the Convention instead provides that it does not apply to "other subjects of international law," but adds that it does not affect "the legal force of such agreements."²³ Thus, the Convention does not maintain that agreements with "other subjects of international law" are non-binding instruments; rather, by acknowledging the "legal force" of such agreements, the Convention implies that they may be binding under the customary law of treaties.

The great weight of scholarly opinion also has concluded that the Holy See has treaty-making capacity, whether or not it is a state in the strict sense of the word. Even commentators who doubt the Holy See's statehood appear to stop short of concluding that it lacks treaty-making capacity.²⁴ Some older commentary questioned the Holy See's capacity to enter into treaties during the period after Italy's subjugation of the Papal State in 1870 and before Italy's recognition of the State of the City of the Vatican in 1929.²⁵ But after 1929, most scholars have accepted that the Holy See has the capacity to make treaties, and that the Vatican, Holy See, or both are states under customary international law.²⁶ Insofar as scholarly commentary is a source of international law,²⁷ it supports the

23. Vienna Convention, *supra* note 8, art. 3, para. (a), at 334.

24. See Abdullah, *supra* note 15, at 1874 (observing that "[t]he Holy See is party to numerous bilateral and multilateral treaties"); *cf. id.* at 1875 (arguing that the Holy See should be treated as a non-governmental organization at international conferences and the United Nations, but avoiding comment on the Holy See's capacity to make treaties).

25. See Charles G. Fenwick, *The New City of the Vatican*, 23 AM. J. INT'L L. 371, 371 (1929) (noting that some writers concluded that the Holy See "had since 1870 lost all international character whatever"); *id.* at 372 (noting that some publicists viewed concordats between the Holy See and Catholic states as "no more than domestic legislation on the part of the states concluding them with the Holy See"); *cf.* 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 107, at 254 (H. Lauterpacht ed., 8th ed. 1955) (asserting that the Lateran Treaty of 1929 "marks the resumption of the formal membership, interrupted in 1871, of the Holy See in the society of States").

26. See, e.g., 1 OPPENHEIM'S INTERNATIONAL LAW 328 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) ("The strict view ought probably to be that the Lateran Treaty created a new international state of the Vatican City, with the incumbent of the Holy See as its Head; but the practice of states does not always sharply distinguish between the two elements in that way. Nevertheless, it is accepted that in one form or the other there exists a state . . ."); Fenwick, *supra* note 25, at 374 ("Technically speaking, a new state now enters the family of nations and, diminutive though it be, takes its place beside the other independent sovereignties . . ."); Gordon Ireland, *The State of the City of the Vatican*, 27 AM. J. INT'L L. 271, 273 (1933) ("By the cession of a small amount of territory, Italy has thus created a new temporal sovereign in the world . . ."); *id.* (describing the Holy See as a "new state"); Josef L. Kunz, *The Status of the Holy See in International Law*, 46 AM. J. INT'L L. 308, 310 (1952) (asserting that the Holy See has treaty-making capacity); Herbert Wright, *The Status of the Vatican City*, 38 AM. J. INT'L L. 452, 452 (1944) (referring to the Vatican City as a "State").

27. See Statute of the International Court of Justice, June 26, 1945, art. 38, para. 1(d),

conclusion that the Holy See has the capacity to make treaties whether or not it fits the traditional definition of a state.

Because it is clear that the Holy See has the capacity to make treaties such as the Fundamental Agreement, it is not strictly necessary to determine whether the Holy See, the Vatican, or both are a state. In any event, there is abundant evidence that either the Holy See, the Vatican, or both constitute a state. The only difficulty is that the Vatican, which has a territory, population, and government, seems to fit the traditional legal definition of statehood more easily than the Holy See, which consists of the Pope and central institutions of the Roman Curia. Yet it is the Holy See, and not the Vatican, that is a party to the Fundamental Agreement.

To appreciate this problem, one must understand the juridical difference between the Holy See and the Vatican. According to the Code of Canon Law, the term "Holy See" (or "Apostolic See") applies "not only to the Roman Pontiff but also to the Secretariat of State, the Council for the Public Affairs of the Church, and other institutions of the Roman Curia."²⁸ The Holy See, then, refers to the Pope and other high organs of the Catholic Church; it is the institution through which the Pope exercises "spiritual sovereignty" over the "Church universal."²⁹ The City of the Vatican, by contrast, is a physical territory, surrounded by Italy, that exists to ensure the independence of the Holy See, to support the work of the Church, and to provide a tangible symbol of the Church's sovereignty. It was established by the 1929 Treaty of the Lateran between Italy and the Holy See in which Italy recognized a "State of the Vatican," over which the Holy See would have exclusive sovereignty.³⁰

How is it, then, that the Vatican is the "state" but the Holy See is the party to the Fundamental Agreement and other treaties? Several theo-

59 Stat. 1055, 1060 (providing that the ICJ shall apply "the teachings of the most highly qualified publicists" as "subsidiary means" for determining international law).

28. 1983 CODE c.361 (Canon Law Society of America trans.); *see also* HYGINUS EUGENE CARDINALE, *THE HOLY SEE AND THE INTERNATIONAL ORDER* 82 (1976) (providing a similar definition and noting that the Holy See also sometimes designates the Pope in his role as "visible head of the Church," and sometimes refers more generally to the "spiritual organisation of papal government").

29. *See* CARDINALE, *supra* note 28, at 84.

30. Treaty of the Lateran, Feb. 11, 1929, Vatican-Italy, art. 26, para. 2, 23 AM. J. INT'L L. 187, 195 (Supp. 1929) ("Italy . . . recognizes the State of the Vatican under the sovereignty of the Supreme Pontiff."); *see also id.* art. 2, at 187 ("Italy recognizes the sovereignty of the Holy See in the field of international relations . . ."). The parties have recently reaffirmed their commitments. *See* Agreement to Amend the 1929 Lateran Concordat, Feb. 18, 1984, Vatican-Italy, art. 1, 24 I.L.M. 1589, 1591 (1985) ("The Italian Republic and the Holy See reaffirm that the State and the Catholic Church are, each in its own order, independent and sovereign . . .").

ries have been advanced to explain this unique treaty-making arrangement. One theory is that both are states, or at least international personalities, acting in a "real union."³¹ A second view is that the Vatican is the state and the Holy See is its government.³² A third is that the Vatican is a "vassal state" of the Holy See.³³ These theories have a common point of departure: the proposition that the Vatican has at least some attributes of statehood.

That proposition is undeniable. The Vatican does in fact meet the traditional requirements of statehood as expressed in the 1933 Montevideo Convention, namely that a state must have a defined territory, a permanent population, a government, and the capacity to engage in foreign relations.³⁴ The City of the Vatican has a defined, albeit small, territory that occupies less than half a square mile of land—a third the size of the next smallest state, Monaco. It is generally accepted that "no rule prescribes a minimum" amount of territory.³⁵ One commentator who argues that the Vatican is not a state nonetheless concedes that "[t]he size of the state . . . is not relevant to its claim to statehood."³⁶ As such, the Vatican is the world's smallest state.

31. Abdullah, *supra* note 15, at 1857-58. Another version of this theory reasons that: The Church and the Vatican State, remaining distinct persons in international law, are united, in virtue of a real union, in the person of the Pope. As Sovereign of both the Church and the State, the Pope uses the Holy See as the common supreme organ through which he exercises his sovereignty with regard to both these international bodies.

CARDINALE, *supra* note 28, at 116.

32. Cf. Mark Thomas Van Der Molen, Note, *Diplomatic Relations Between the United States and the Holy See: Another Brick from the Wall*, 19 VAL. U. L. REV. 197, 198 (1984) ("The United States government asserts that [its] diplomatic relations with the Holy See concern only the Holy See's role as the authority of the secular Vatican City . . .").

The United States elevated its Mission to the Holy See to a full-fledged Embassy in 1984. See *Elevation of Mission to Holy See to Embassy*, I CUMULATIVE DIGEST OF U.S. PRACTICE INTERNATIONAL LAW 1981-88, at 894-96 (1993). Two lawsuits in U.S. courts challenged this decision on a violation of the Establishment Clause of the Constitution. Those lawsuits were turned aside on standing and political question grounds. See *Americans United for Separation of Church and State v. Reagan*, 607 F. Supp. 747 (D. Pa. 1985), *aff'd*, 786 F.2d 194 (3d Cir. 1986); *Phelps v. Reagan*, 812 F.2d 1293 (10th Cir. 1987).

33. Samuel W. Bettwy & Michael K. Sheehan, *United States Recognition Policy: The State of Vatican City*, 11 CAL. W. INT'L L.J. 1, 9 (1981) ("Vatican City is but a vassal State of the Holy See.").

34. See Montevideo Convention, *supra* note 16, art. 1, 49 Stat. at 3100, 165 L.N.T.S. at 25.

35. HENKIN ET AL., *supra* note 17, at 248.

36. Abdullah, *supra* note 15, at 1863.

Skeptics about the Vatican's claim to statehood focus more on the Vatican's supposed lack of a permanent population. They argue that the Vatican's population of more than 1000 people is not "permanent" because "citizens" of the Vatican are generally "Church officials and employees . . . [whose] citizenship is temporary."³⁷ But the Vatican does include at least *some* people whose citizenship is permanent. The Pope himself, of course, is a permanent resident of the Vatican. The Constitutional Laws of the City of the Vatican also provide that Cardinals living in Vatican City or in Rome are citizens of the City of the Vatican,³⁸ and their citizenship is lost only when "they cease to reside in the City of the Vatican or in Rome."³⁹ Other people who "reside in the City of the Vatican in a permanent fashion because of their rank, office, service or employment" are citizens.⁴⁰ This provision obviously contemplates that their residence may be "permanent."

In any event, the "permanent population" test of statehood is not whether citizens retain their citizenship indefinitely; after all, many states contain large numbers of people who are not citizens of the state, as well as people who voluntarily give up their citizenship to move abroad. Instead, the test is whether the population is permanent as opposed to transient. The Vatican clearly satisfies that test. In an increasingly interdependent and hectic world, it seems unlikely that the law will move to a more stringent definition of permanence. Indeed, statehood doctrine has long been criticized for being too narrow because it excludes nomadic peoples and national liberation movements from the definition of statehood.⁴¹

37. *Id.* at 1862.

38. Constitutional Law of the City of the Vatican, Law No. 3, art. 1, para. (a) (1929), reprinted in 3 AMOS J. PEASLEE, CONSTITUTIONS OF NATIONS 666, 687 (2d ed. 1956).

39. *Id.* art. 6, para. (a), at 687.

40. *Id.* art. 1, para. (b), at 687.

41. See S. James Anaya, *The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective*, 1989 HARV. INDIAN L. SYMP. 191 (1990) (contrasting the writings of early natural-law writers, who held that indigenous peoples possessed certain characteristics of statehood, with the position of positivists and states, who denied the existence of such characteristics). As von Glahn put it:

Indian tribes in North America and other tribes elsewhere were at one time held to be equivalent to international persons by a few writers. States, on the other hand, usually denied such status to tribes, and agreements made with them were subsequently (and often quite unfairly) denied the character of binding treaties.

GERHARD VON GLAHN, LAW AMONG NATIONS 88 (2d ed. 1970). For more on the treaty-making capacity of indigenous peoples, see generally *Discrimination Against Indigenous Peoples: Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations, First Progress Report Submitted by Mr. Miguel Alfonso Martinez, Special Rapporteur*, U.N. ESCOR, 44th Sess., Agenda Item 15, U.N.

Those who doubt the Vatican's statehood also argue that it lacks a government in the traditional sense.⁴² In one incarnation, this argument stresses that the government of the Holy See is "charged with overseeing a religion, rather than a nation."⁴³ But of course the Pontifical Commission does oversee the relatively mundane business of running a nation: it has jurisdiction over internal matters such as postal and telegraph services, security, personnel matters, technical services, medical services, the radio system, the Vatican Observatory, and tourist services.⁴⁴

Opponents of the Vatican's statehood also emphasize that one arm of government, the Secretariat of State, handles international relations, whereas another, the Pontifical Commission, handles internal matters.⁴⁵ Thus, it is said that "[t]he Pontifical Commission is not, strictly speaking, the 'government' of the Vatican City, since it is mainly responsible for technical and other services, and does not maintain relations with foreign states or the United Nations."⁴⁶ This argument also might imply that the Vatican lacks the capacity to engage in foreign relations, since such matters are handled by the Secretariat of State, not the "government" of the Vatican. Nonetheless, states routinely separate the powers of government, and in any event the Sovereign Pontiff has ultimate authority over both the spiritual and temporal activities of the Church, and over both domestic and international relations.⁴⁷ In any event, there exists clear

Doc. E/CN.4/Sub.2/1992/32 (1992); IAN BROWNLIE, *TREATIES AND INDIGENOUS PEOPLES* (F.M. Brookfield ed., 1992).

Many commentators also have argued that statehood doctrine should make more allowance for national liberation movements. See, e.g., ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* paras. 51-56, at 90-99 (1986) (arguing that national liberation movements have international personality); Helmut Freudenschuss, *Legal and Political Aspects of the Recognition of National Liberation Movements*, 11 J. INT'L STUD. 115, 116 (1982) (arguing that such movements have a "limited" international personality); Malcolm Shaw, *The International Status of National Liberation Movements*, 5 LIVERPOOL L. REV. 19 (1983) (arguing that national liberation movements are subjects of international law).

42. See Abdullah, *supra* note 15, at 1865-66.

43. *Id.* at 1865.

44. See *id.*

45. See *id.* (explaining the roles and structure of the administrative organs of the Catholic Church).

46. *Id.*

47. See Fundamental Law of the City of the Vatican, art. 1 (1929), reprinted in PEASLEE, *supra* note 38, at 677 ("The Sovereign Pontiff, sovereign of the City of the Vatican, has full legislative, executive, and judicial powers."); *id.* art. 3, at 677 ("Reserved to the Sovereign Pontiff is the representation of the state of the Vatican, by the intermediary of the Secretary of State, for the conclusion of treaties and for diplomatic relations with foreign states."); *id.* art. 4, at 677 (providing that the Pontiff may delegate legislative powers concerning the "government" of the City of the Vatican); *id.* art. 5, at 677 (reserving power to approve city budgets and accounts to the Sovereign Pontiff).

evidence of the Vatican's capacity to engage in foreign relations—its diplomatic relations with more than 150 countries.⁴⁸

In sum, the Vatican meets the traditional four tests of statehood. It has a defined territory, a permanent population, a government, and the capacity to engage in foreign relations. In addition, the Holy See clearly has treaty-making capacity. Because both the Holy See and Israel possess the capacity to make treaties, the Fundamental Agreement is a full-fledged treaty governed by treaty law.

A final question is whether the Fundamental Agreement is governed by the Vienna Convention on the Law of Treaties for purposes of interpretation. Is the Fundamental Agreement an agreement "between states" and therefore covered by the Vienna Convention, or is it an agreement between the State of Israel and a "subject of international law," and therefore governed by the customary law of treaty interpretation? As a practical matter, the answer may not matter much, since the Vienna Convention's provisions on interpretation, as on many other matters, reflect customary law.⁴⁹ Under both customary law and the Vienna Convention, the agreement should be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in . . . light of its object and purpose," and, in cases of ambiguity, in accordance with any relevant *travaux préparatoires*.⁵⁰ More to the point, the Fundamental Agreement should be interpreted in accordance with "any relevant rules of international law applicable in the relations between the parties."⁵¹ The question, then, is whether there are any "relevant rules" on international pilgrimage in human rights law. The next part of this Article takes up that question.

II. PILGRIMAGE UNDER THE FUNDAMENTAL AGREEMENT

Article 5 of the Fundamental Agreement deals with pilgrimage. It provides:

1. The Holy See and the State of Israel recognize that both have an interest in favouring Christian pilgrimages to the Holy

48. See 1996 CATHOLIC ALMANAC 47 (Felician A. Foy & Rose M. Avato eds., 1995).

49. See Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), 1991 I.C.J. 53, 70, reprinted in 31 I.L.M. 32, 45 (1992) (noting that Articles 31 and 32 of the Vienna Convention "may in many respects be considered as a codification of existing customary international law"); Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 200 n.34 (1996) ("Articles 31 and 32 of the [Vienna] Convention, which cover the interpretation of treaties, are often considered to codify, or currently represent, customary international law.").

50. Vienna Convention, *supra* note 8, art. 31, para. 1, at 340; *id.* art. 32, at 340.

51. *Id.* art. 31, para. 3(c), at 340.

Land. Whenever the need for coordination arises, the proper agencies of the Church and of the State will consult and cooperate as required.

2. The State of Israel and the Holy See express the hope that such pilgrimages will provide an occasion for better understanding between the pilgrims and the people and religions in Israel.⁵²

At the outset, it is worth noting that the parties recognize an interest in favoring only Christian pilgrimages and not pilgrimages by members of other religions. This provision obviously is not intended to rule out pilgrimage by members of other religious groups; Israel, for example, surely has an interest in Jewish pilgrimage. Moreover, Israel has entered into separate agreements with the Palestinians and Jordan in respect of Muslim access to Muslim holy sites; those agreements do not contain any detailed provisions on Christian pilgrimage.⁵³

A more interesting aspect of the provision is its limited character. As Professor Hirsch observed in his remarks at this Symposium, Article 5 does not recognize an individual "right" to pilgrimage.⁵⁴ The provision does provide that the *parties*—Israel and the Holy See—"have an interest" in favoring pilgrimage to the Holy Land, but this provision does not explicitly recognize any *individual* interest in pilgrimage. Moreover, the provision speaks only of "favouring" pilgrimage, a more passive form of encouragement than "promoting" pilgrimage. Indeed, Article 5 fails to impose on the parties any affirmative duty to facilitate pilgrimage, much less subsidize it.

These limitations have potential significance because Article 5 must be construed in light of the human rights treaties to which Israel and the Holy See are parties. If human rights law requires the parties to recognize an individual right to pilgrimage, or even to take affirmative steps to promote it, then Article 5 cannot be construed as an effort to limit those rights and duties. Far from it: the Fundamental Agreement itself pro-

52. Fundamental Agreement, *supra* note 5, art. 5, at 156.

53. See, e.g., Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan, Oct. 26, 1994, art. 9, para. 1, 34 I.L.M. 43, 50 (1995) ("Each Party will provide freedom of access to places of religious and historical significance."); *id.* art. 9, para. 2, at 50 (providing that Israel "respects the present special role" of Jordan in Muslim Holy Shrines and that Israel "will give high priority to the Jordanian historic role in these shrines" during peace negotiations); see also Interim Agreement on the West Bank and the Gaza Strip, Sept. 28, 1995, Isr.-PLO, Annex III, app. 1, art. 32, 36 I.L.M. 551, 619 (1997) (providing for access to, and protection of, Holy Sites in the West Bank and Gaza Strip); Protocol Concerning the Redeployment in Hebron, Jan. 17, 1997, Isr.-PLO, art. 6, 36 I.L.M. 650, 653 (1997) (making similar provision for Holy Sites in the Hebron area).

54. See Hirsch, *supra* note 4, at 12.

vides that it "does not prejudice rights and obligations arising from existing treaties between either Party and a State or States."⁵⁵ Similarly, human rights law provides that at least some rights of religious freedom are non-derogable.⁵⁶

Is Article 5 consistent with international human rights law? It is not entirely clear that there is a right to international pilgrimage in human rights law, or that states have a duty to do anything more than "favor" pilgrimage. As Professor Hirsch pointed out during the Symposium, the major human rights instruments speak only in general terms about freedom of religion and, separately, of freedom to travel; they generally do not provide explicitly that religious freedom includes a right of pilgrimage.⁵⁷

Article 18 of the Universal Declaration of Human Rights, for example, provides in general terms that "[e]veryone has the right to freedom of thought, conscience and religion" and "to manifest his religion or belief in teaching, practice, worship and observance."⁵⁸ It is not made clear whether pilgrimage abroad is part of the right to "manifest" one's religious belief. It has been suggested that "when a pilgrimage is an essential part of a faith, any systematic prohibition or curtailment of the possibility for pilgrims . . . to enter a foreign country where the sacred place is located, would constitute a serious infringement of the right of the individual to manifest his religion or belief."⁵⁹ This view necessarily presupposes some right of pilgrims to enter foreign territory and some duty of states to admit foreign pilgrims.

The problem with this argument is that the Universal Declaration generally does not recognize a right of entry into foreign territory, or a duty of states to admit aliens; the Universal Declaration establishes such

55. Fundamental Agreement, *supra* note 5, art. 13, para. 2, at 158.

56. See, e.g., ICCPR, Dec. 19, 1966, art. 4, para. 2, 999 U.N.T.S. 171, 174 [hereinafter ICCPR] (prohibiting any "derogation from" Article 18 of the ICCPR relating to religious freedom).

57. See Hirsch, *supra* note 4, at 12.

58. Universal Declaration of Human Rights, Dec. 10, 1948, art. 18, G.A. Res. 217 A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810, at 74 (1948) [hereinafter Universal Declaration].

59. Arcot Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*, U.N. Doc. E/CN.4/Sub.2/200/Rev.1 (1960), reprinted in 11 N.Y.U. J. INT'L L. & POL. 227, 247 (1978); see also Peter W. Mason, Note, *Pilgrimage to Religious Shrines: An Essential Element in the Human Right to Freedom of Thought, Conscience, and Religion*, 25 CASE W. RES. J. INT'L L. 619, 638 (1993) ("[P]ilgrimage plays an important role in most of the world's religions. Therefore, it is necessary to recognize that the practice of pilgrimage must be protected as an essential part of the human right to freedom of thought, conscience, and religion.").

rights and duties only in respect of refugees. Article 13(2) of the Universal Declaration does recognize one's "right to leave any country, including his own, and to return to his country."⁶⁰ This provision, however, does not explicitly include a right to enter any country other than one's own, and it does not impose on states any obligation to admit tourists or travelers. By contrast, the Universal Declaration's provision on *internal* travel, Article 13(1), expressly provides that "[e]veryone has the right to freedom of movement and residence within the borders of each State."⁶¹ Unlike Article 13(1), Article 13(2) refrains from establishing any generalized right of "movement" to, or residence in, other states.⁶² That does not necessarily mean that one has a right to travel only to the high seas and uninhabited areas like Antarctica, but rather that one has a right to leave one's own country and visit, or remain permanently in another country, if that country is amenable. As Professor Vagts has put it, there is a right to leave, but "[t]he right to enter a country does not . . . exist except in certain cases involving asylum seekers and, without that right to enter, the right to leave may be an empty one."⁶³

Moreover, Article 14 of the Universal Declaration creates an explicit right of sojourn for refugees, but not for pilgrims. It states that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution."⁶⁴ Indeed, Article 14 has been read as providing "the

60. Universal Declaration, *supra* note 58, art. 13, para. 2, at 74.

61. *Id.* art. 13, para. 1, at 74 (emphasis added). Moreover, Article 29 of the Universal Declaration permits a restriction of rights if they are "determined by law" and meet the "just requirements of morality, public order and the general welfare." *Id.* art. 29, para. 2, at 77.

62. *But cf.* WARREN FREEDMAN, *THE INTERNATIONAL RIGHT TO TRAVEL, TRADE AND COMMERCE* 25 (1993) (citing Article 13 and other provisions of human rights law as evidence that "the probabilities of . . . recognition of the human right to travel internationally have discernibly increased").

63. Detlev F. Vagts, *The Proposed Expatriation Tax—A Human Rights Violation?*, 89 AM. J. INT'L L. 578, 579 n.13 (1995); *see also* Francis A. Gabor, *Reflections on the Freedom of Movement in Light of the Dismantled "Iron Curtain,"* 65 TUL. L. REV. 849, 851 (1991) ("Subsection 2 of article 13 clearly sets forth the right of free emigration from any country. This is, however, only a one-way freedom. Once individuals leave their native countries, they have to find a country that will admit them as aliens."). *But cf.* DANIEL C. TURACK, *THE PASSPORT IN INTERNATIONAL LAW* 12 (1972) (asserting that freedom to travel abroad "comprises the right to leave one's country, the right to gain ingress, travel within and egress from the country visited and the right to return to one's country"). For a summary of the negotiating history of Article 13 of the Universal Declaration, see Jeffrey Barist, et al., *Who May Leave: A Review of Soviet Practice Restricting Emigration on Grounds of Knowledge of "State Secrets" in Comparison with Standards of International Law and the Policies of Other States*, 15 HOFSTRA L. REV. 381, 385-87 (1987).

64. Universal Declaration, *supra* note 58, art. 14, at 74.

only way of exercising”⁶⁵ the “right of immigration” set forth in Article 13(2). It seems doubtful that Article 14 reflects the *only* way to exercise the right set forth in Article 13(2). Article 13(2) does not merely establish a right of emigration or immigration; it establishes a right to leave and return, which implies that one has a right to make temporary visits to a willing recipient state. A 1986 U.N. Declaration on the Right to Leave and Return provides explicitly that the right to leave includes the right to leave temporarily.⁶⁶ Nonetheless, Article 14 does imply that a non-refugee has no right to seek asylum and, more generally, no right to enter a state that is not willing to accept visitors, tourists, pilgrims, or immigrants.

Indeed, it is often said that a state has an absolute or at least very broad right to exclude aliens⁶⁷ subject to obligations under refugee law.⁶⁸ That broad proposition has been criticized vigorously by some commentators as an inaccurate statement of the law and an ugly expression of nativism.⁶⁹ The World Tourism Organization even has suggested that

65. Gabor, *supra* note 63, at 851.

66. See Strasbourg Declaration on the Right to Leave and Return, Nov. 26, 1986, art. 1, reprinted in Hurst Hannum, Current Development, *The Strasbourg Declaration on the Right to Leave and Return*, 81 AM. J. INT'L L. 432, 434 (1987) (“Everyone has the right to leave any country, including one’s own, temporarily or permanently.”). Representatives of 11 states, together with a U.N. special rapporteur on the right to leave and return, participated in the preparation of the Declaration on the Right to Leave and Return. See *id.* at 432.

67. See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) (finding a right to exclude in “ancient principles” of international law); *Nottebohm Case* (Liech. v. Guat.), 1955 I.C.J. 4, 46-47 (Apr. 6) (Read, J., dissenting) (speaking of an “unfettered right” of states to refuse admission); OPPENHEIM, *supra* note 25, § 294, at 645-46 (discussing the ability of states to expel non-citizens); GUY S. GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 160 (1978) (“States retain a wide margin of appreciation in the matter of entry to their territory.”); Vagts, *supra* note 63, at 579 n.13 (noting that the right of entry does not exist “except in certain cases involving asylum seekers”); 1 GEORG SCHWARZENBERGER, INTERNATIONAL LAW 361 (3d ed. 1957) (speaking of a “right of expulsion”).

68. See Vagts, *supra* note 63, at 579 n.13 (discussing asylum). The Refugee Convention, of course, forbids states to expel or return (*refouler*) a refugee to a state where his or her life or freedom is jeopardized because of race, religion, nationality, or political belief. See Protocol to Convention on Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, 606 U.N.T.S. 267; Convention Relating to the Status of Refugees, July 28, 1951, art. 33, para. 1, 189 U.N.T.S. 137, 176 (prohibiting, in these cases, expulsion or *refoulement* of refugees); cf. Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, art. 31, para. 1, 360 U.N.T.S. 117, 152 (“The Contracting States shall not expel a stateless person lawfully in their territory save on grounds of national security or public order.”); *id.* art. 32, 360 U.N.T.S. at 154 (“The Contracting States shall as far as possible facilitate the assimilation and naturalization of stateless persons.”).

69. See, e.g., James A. R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804, 804-07 (1983) (arguing that states do not and should

“[t]ourism has become increasingly a basic need, a social necessity, a human right”⁷⁰—a proposition that one commentator has dismissed as “frivolous.”⁷¹ But even one commentator who argues that states have a “qualified duty to admit aliens when they pose no danger to the public safety, security, general welfare, or essential institutions of a recipient state”⁷² presses that case only for aliens seeking permanent residence, not visitors,⁷³ and he concedes that “a state has no duty to admit all aliens who might seek to enter its territory.”⁷⁴

In any event, even if the Universal Declaration does embrace a right to international travel, it is not directly binding on Israel or the Holy See because it is only a General Assembly resolution and not a treaty.⁷⁵ Of

not have an unfettered right to exclude immigrants).

70. *Promotion of Tourism*, G.A. Res. 32/157, U.N. ESCOR, 2d Sess., Agenda Item 22, at para. 21, U.N. Doc. E/1978/98 (1978).

71. Philip Alston, *Conjuring Up New Human Rights: A Proposal For Quality Control*, 78 AM. J. INT'L L. 607, 611 (1984); see also Christina M. Cerna, Book Review, 79 AM. J. INT'L L. 817, 819 & n.2 (1985) (reviewing VOLKERRECHT ALS RECHTSORDNUNG—INTERNATIONALE GERICHTSBARKEIT—MENSCHENRECHTE: FESTSCHRIFT FÜR HERMANN MOSLER (Rudolf Bernhardt et al. eds., 1983)) (speaking of Sir Gerald Fitzmaurice, a former judge on the European Court of Human Rights, known for his skepticism about an overly expansive conception of human rights: “One can only imagine Fitzmaurice’s reaction to such new human rights as the ‘right to tourism’ or the ‘right to sleep.’”) (citing Alston, *supra*).

72. Nafziger, *supra* note 69, at 805.

73. See *id.* at 806 (“[T]his article will focus on more or less permanent migration rather than on the admission of such transient classes of aliens as diplomats, temporary workers, visitors, or students.”); see also *id.* at 841 n.197 (noting Professor D’Amato’s skepticism about a rule requiring admission of tourists, and implying that different equities might apply to more permanent visitors).

74. *Id.* at 804. There is extensive literature on the right to leave and return. See, e.g., J.L. BRIERLY, *THE LAW OF NATIONS* 276-90 (Humphrey Waldock ed., 6th ed. 1963); CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 182 (P.E. Corbett trans., revised ed. 1968); HURST HANNUM, *THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE* (1987); RAINER HOFMANN, *DIE AUSREISEFREIHEIT NACH VÖLKERRECHT UND STAATLICHEM RECHT* (1988); JOSÉ D. INGLÉS, *STUDY OF DISCRIMINATION IN RESPECT OF THE RIGHT OF EVERYONE TO LEAVE ANY COUNTRY, INCLUDING HIS OWN, AND TO RETURN TO HIS COUNTRY*, U.N. Doc. E/CN.4/Sub.2/220/Rev.1, U.N. Sales No. 64 XIV. 2 (1963); LIBERTÉ DE CIRCULATION DES PERSONNES EN DROIT INTERNATIONAL (Maurice Flory & Rosalyn Higgins eds., 1988) [hereinafter *LIBERTÉ DE CIRCULATION*]; Rona Aybay, *The Right to Leave and the Right to Return: The International Aspect of Freedom of Movement*, 1 COMP. L. Y.B. 121 (1977).

75. As Eleanor Roosevelt noted at the time of the adoption of the Universal Declaration, the document “is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation.” Statement of Eleanor Roosevelt, Chairman of the Commission on Human Rights, 19 DEP’T ST. BULL. 751 (1948), reprinted in 5 MARJORIE M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 243 (1965). Article 10 of the United Nations Charter provides the General Assembly may make only “recommendations” on matters within the scope of the United Nations Charter. See Josef

course, the Universal Declaration may have legal consequences anyway, either on the theory that it has become part of customary law,⁷⁶ or on the theory that it is an "authoritative interpretation" of the human rights provisions of the U.N. Charter.⁷⁷ Whatever the status of the Declaration, it is appropriate to consult other human rights instruments that might contain a right of pilgrimage.

The International Covenant on Civil and Political Rights (ICCPR),⁷⁸ to which Israel but not the Holy See is a party, is of course a binding instrument, and it contains general language on religious freedom that is identical to that in the Universal Declaration.⁷⁹ The ICCPR also includes a paragraph providing that religious freedom "may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and

L. Kunz, *The United Nations Declaration of Human Rights*, 43 AM. J. INT'L L. 316, 318 (1949). But see Louis B. Sohn, *The Human Rights Law of the Charter*, 12 TEX. INT'L L.J. 129, 133 (1977) (arguing that the Universal Declaration is a "binding instrument in its own right" as well as an authoritative interpretation of the United Nations Charter).

76. See, e.g., *Namibia Case*, 1971 I.C.J. 16, 76 (June 21) (separate opinion of Judge Ammoun) (noting that the Universal Declaration may have codified custom or "acquired the force of custom," and citing the right to equality as an example of a Universal Declaration norm that is a "preexisting binding customary norm"); RICHARD B. LILlich & HURST HANNUM, *INTERNATIONAL HUMAN RIGHTS* 134-36 (3d ed. 1995) (excerpting opinions of various states and scholars who maintain that some portions of the Universal Declaration now embody customary law); John P. Humphrey, *The International Bill of Rights: Scope and Implementation*, 17 WM. & MARY L. REV. 527, 529 (1976) (noting that many authorities consider the Universal Declaration as "part of the customary law of nations"); Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 394-95 (1985) (same).

77. See Montreal Statement of the Assembly for Human Rights, Mar. 22-27, 1968, 9 J. INT'L COMM'N JURISTS 94, 94-95 (1968), excerpted in RICHARD B. LILlich, *INTERNATIONAL HUMAN RIGHTS* 127, 128 (2d ed. 1991) [hereinafter *Montreal Statement*]; *South West Africa (Eth. v. S. Afr., Liber. v. S. Afr.)*, 1966 I.C.J. 4, 293 (July 18) (dissenting opinion of Judge Tanaka) ("[T]he Universal Declaration of Human Rights . . . although not binding in itself, constitutes evidence of the interpretation and application of the relevant Charter provisions."); Frank Newman, *Interpreting the Human Rights Clauses of the U.N. Charter*, 1972 REVUE DES DROITS DE L'HOMME 283.

78. Dec. 19, 1966, 999 U.N.T.S. 171.

79. *Id.* art. 18, para. 1, at 178. Article 18 has been called "the most important provision on religious freedom in international law." T. Jeremy Gunn, Book Review, 90 AM. J. INT'L L. 707, 708 (1996) (reviewing BAHIIYIH G. TAHZIB, *FREEDOM OF RELIGION OR BELIEF: ENSURING EFFECTIVE INTERNATIONAL LEGAL PROTECTION* (1996)). Indeed, the Human Rights Committee has said that the terms "religion" and "belief" in Article 18 should be "broadly construed." W. Cole Durham, Jr., et al., *The Future of Religious Liberty in Russia: Report of the De Burgh Conference on Pending Russian Legislation Restricting Religious Liberty*, 8 EMORY INT'L L. REV. 1, 15 (1994) (quoting General Comment Number 22(48) concerning Article 18). Nonetheless, the Human Rights Committee has been criticized for failing to find any violation of Article 18 in its decisions on petitions relating to religious freedom. See Gunn, *supra*, at 708.

freedoms of others.”⁸⁰ Interestingly, the right to return is phrased somewhat differently in the ICCPR than in the Universal Declaration. Like the Universal Declaration, the ICCPR provides that everyone “shall be free to leave any country, including his own,”⁸¹ but while the Universal Declaration flatly provided for a “right . . . to return,” the ICCPR provides only that “[n]o one shall be *arbitrarily* deprived of the right to enter his own country.”⁸² This equivocation on one’s right to return to one’s *own* country certainly raises questions about one’s right to enter a *foreign* country.⁸³ Moreover, this provision on exit and entry is accompanied by a contrasting provision on internal travel: “Everyone lawfully within the territory of a State shall, within that territory, have the right to

80. ICCPR, *supra* note 56, art. 18, para. 3, at 178. On the other hand, the ICCPR also provides that “[n]o derogation” may be made from Article 18, the provision on religious freedom. *Id.* art. 4, para. 2, at 174.

Like other major human rights instruments, the ICCPR contains general norms forbidding discrimination based on religion. *See id.* art. 2, para. 1, at 173 (obliging parties to apply the ICCPR “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”); *id.* art. 4, para. 1, at 174 (forbidding emergency measures that discriminate solely on the basis of religion); *see also* U.N. CHARTER, art. 1, para. 3 (providing that the United Nations should respect human rights “without distinction as to” religion); *id.* art. 55, para. c (stating that the United Nations “shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to . . . religion”); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 2, para. 2, 993 U.N.T.S. 3, 5 (providing that parties shall “guarantee” that rights will be “exercised without discrimination” as to religion). The Economic and Social Covenant also provides that parties should permit parents to choose schools that “ensure the religious and moral education of their children.” *Id.* art. 13, para. 3, at 8. More generally, it provides that parties should recognize the right of everyone to “take part in cultural life.” *Id.* art. 15, para. 1(a), at 9.

81. ICCPR, *supra* note 56, art. 12, para. 2, at 176.

82. *Id.* art. 12, para. 4, at 176 (emphasis added). The International Convention on the Elimination of All Forms of Racial Discrimination, to which both the Holy See and Israel are parties, speaks of the “right to leave any country, including one’s own, and to return to one’s country.” *Opened for signature* Mar. 7, 1966, art. 5, para. (d)(ii), 660 U.N.T.S. 211, 220. Again, that Convention contains a contrasting provision recognizing a “right to freedom of movement and residence within the border of the State.” *Id.* art. 5, para. (d)(i), at 220. It also contains a general recognition of a “right to freedom of thought, conscience and religion.” *Id.* art. 5, para. (d)(vii), at 222. Like the Covenant, the Convention seems to stop short of establishing a general right to enter any foreign country.

83. To be sure, there is a duty of states to admit their own nationals in ordinary circumstances. *See, e.g.,* GOODWIN-GILL, *supra* note 67, at 137 (citing *Van Duyn v. Home Office*, 1 C.M.L.R. 1, 18 (E.C.J. 1975) (“[I]t is a principle of international law . . . that a State is precluded from refusing to its own nationals the right of entry or residence.”)). Even so, there has been debate over particular aspects of this duty, such as a state’s obligation to receive its nationals when they have been expelled unlawfully from other states. *See id.* at 136-37.

liberty of movement and freedom to choose his residence.”⁸⁴ As with the Universal Declaration, the ICCPR provision on international travel is therefore more circumscribed than that on domestic travel. Finally, Article 13 of the ICCPR provides that aliens may be “expelled” from a state’s territory “only in pursuance of a decision reached in accordance with law”—implying that states have a right to expel, and presumably exclude, aliens.⁸⁵ Taken as a whole, the ICCPR does not appear to establish a general right to enter any foreign country.⁸⁶

The 1981 U.N. Declaration on the Elimination of Religious Intolerance⁸⁷ contains somewhat more specific language relevant to pilgrimage. Article 6(a) of the Declaration provides that religious freedom includes the freedom to “worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes.”⁸⁸ But this provision says nothing about *international* travel for the purpose of assembling in connection with a religious belief. Article 6(i) recognizes a freedom to “establish and maintain communications with individuals and communities in matters of religion or belief at the national and *international* levels.”⁸⁹ This provision does acknowledge an international dimension to religious observance, but it speaks of communication, not pilgrimage. Even if these provisions are intended to establish a right of international pilgrimage, they are not directly binding on states because

84. ICCPR, *supra* note 56, art. 12, para. 1, at 176. Interestingly, the ICCPR does not list the right to leave and return as a non-derogable right. *See id.* art. 4, para. 2, at 174 (excluding Article 12 from the list of non-derogable provisions).

85. *Id.* art. 13, at 176. Moreover, this limitation on expulsion, like the right to leave and return, is apparently derogable. *See id.* art. 4, para. 2, at 174. Indeed, some states have taken reservations from Article 13 of the ICCPR. *See* Jorge A. Vargas, *NAFTA, the Chiapas Rebellion, and the Emergence of Mexican Ethnic Law*, 25 CAL. W. INT’L L.J. 1, 58 n.351 (1994) (noting that Mexico took a reservation to Article 13 because its Constitution gives it “absolute power” to deport aliens without formal proceedings) (citing Pacto Internacional de Derechos Civiles y Politicos, D.O. May 20, 1981, reprinted in LEGISLACION SOBRE DERECHOS HUMANOS 161-86 (1993)).

86. *Accord* HANNUM, *supra* note 74, at 20 (“The Human Rights Committee has made clear that . . . there is no right in the Covenant to enter any Country except one’s own . . .”); Patrice Jean, *Le Contenu de la Liberté de Circulation*, in LIBERTÉ DE CIRCULATION, *supra* note 74, at 21, 33 (“Il n’y a pas, semble-t-il, dans un monde de souveraineté juridique de l’Etat, de liberté fondamentale d’entrée.”). *But cf. id.* at 34 (“[L]a plupart des pays respectent, plus ou moins, une sorte de droit de l’étranger à passage et brefs séjours innocents. Il en va autrement si la résidence se prolonge.”).

87. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Nov. 25, 1981, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, U.N. Doc. A/36/51 (1982).

88. *Id.* art. 6, para. (a), at 172.

89. *Id.* art. 6, para. (i), at 172 (emphasis added); *cf.* art. 6, para. (e), at 172 (recognizing the freedom to “teach a religion or belief in places suitable for these purposes”).

the Declaration is a non-binding General Assembly resolution.⁹⁰ At most, such a resolution may serve as evidence of customary law.⁹¹

Other instruments speak more explicitly about pilgrimage, but like the Declaration on Religious Intolerance, they are not binding on Israel or the Holy See. In the mid-1960s, the U.N. Commission on Human Rights adopted a Draft Convention on the Elimination of All Forms of Religious Intolerance,⁹² which obliged state parties to "ensure to everyone within their jurisdiction" the "freedom to make pilgrimages and other journeys in connexion with his religion or belief whether inside or outside his country."⁹³ The Convention, however, proved controversial in the full General Assembly. India expressed doubts about the proposed provision on pilgrimage, and Turkey argued that recognition of a right of pilgrimage might compromise a state's effort to control the flight of capital.⁹⁴ In the end, the Assembly failed to approve the draft Convention.⁹⁵

In 1989, the Conference on Security and Co-operation in Europe, (CSCE), now the Organization on Security and Cooperation in Europe (OSCE), adopted the Concluding Document from the Vienna Meeting

90. See U.N. CHARTER art. 10 (providing that the General Assembly may make "recommendations" on matters within the scope of the Charter); *id.* art. 13, para. 1 (a)-(b) (providing that the Assembly may make "recommendations" to encourage the "progressive development" and "codification" of international law and to promote cooperation in social fields); see also Roger S. Clark, *The United Nations and Religious Freedom*, 11 N.Y.U. J. INT'L L. & POL. 197, 208 (1978) (noting that the Declaration would have "no enforcement procedures" and would not be "binding on any state").

91. See Oscar Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES COURS 111-121 (1982-V), reprinted in BARRY E. CARTER & PHILIP R. TRIMBLE, *INTERNATIONAL LAW* 117 (1991) (arguing that law-declaring resolutions have legal effect as "evidence" of customary law). But cf. Montreal Statement, *supra* note 77, at 128 (asserting that the Universal Declaration of Human Rights is an "authoritative interpretation" of the U.N. Charter).

In 1986, the U.N. Human Rights Commission appointed a Special Rapporteur on Religious Intolerance and Discrimination Based on Religion or Belief. The Special Rapporteur's mandate covers "incidents and governmental actions" that are "inconsistent" with the Declaration on Religious Intolerance. C.H.R. Res. 1986/20, U.N. ESCOR, 42d Sess., Supp. No. 2, at 66-67, U.N. Doc. E/CN.4/1986/65 (1986).

92. *Report on the Twenty-Third Session*, U.N. Commission on Human Rights, U.N. ESCOR, 42d Sess., Supp. No. 6, at 29, U.N. Doc. E/CN.4/940 (1967).

93. *Id.* art. 3, para. 2(e), at 33.

94. See U.N. GAOR 3d Comm., 22d Sess., 1487th mtg. at 119-20, U.N. Doc. A/C.3/SR.1487 (1967) (remarks of Turkey); U.N. GAOR 3d Comm., 22d Sess., 1486th mtg., at 116, U.N. Doc. A/C.3/SR.1486 (1967) (remarks of India). For a more comprehensive description of the debates over the draft Convention, see Clark, *supra* note 90, at 211-14.

95. See generally U.N. GAOR 3d Comm., 22d Sess., 1486-1514th mtgs., at 113-257, U.N. Docs. A/C.3/SR.1486-1514 (1967) (discussing the history of and opposition to the draft Convention).

of 1986-89,⁹⁶ a follow-up to the Helsinki Accords,⁹⁷ which set forth human rights standards for European states. The Holy See was one of the states participating in the Concluding Document; Israel and other "non-participating" Mediterranean states made "contributions" to the meeting.⁹⁸ The Concluding Document provided that:

[participating states] will allow believers, religious faiths and their representatives, in groups or on an individual basis, to establish and maintain direct personal contacts and communication with each other, in their own and other countries, *inter alia* through travel, pilgrimages and participation in assemblies and other religious events. In this context and commensurate with such contacts and events, those concerned will be allowed to acquire, receive and carry with them religious publications and objects related to the practice of their religion or belief.⁹⁹

Like the Fundamental Agreement, this provision stops short of recognizing a "right" of pilgrimage. It provides only that states "will allow" pilgrimage, not that they are required to do so by international law. In any event, the Concluding Document, like the Helsinki Accords themselves, was not intended to be legally binding.¹⁰⁰

96. See Conference on Security and Co-operation in Europe, Concluding Document from the Vienna Meeting, Jan. 17, 1989, 28 I.L.M. 527 (1989) [hereinafter Concluding Document].

97. Conference on Security and Co-operation in Europe, Final Act, Aug. 1, 1975, 14 I.L.M. 1292 (1975).

98. See Concluding Document, *supra* note 96, at 531.

99. *Id.* para. 32, at 545.

100. See LOUIS HENKIN, *THE AGE OF RIGHTS* 57 (1990) ("Helsinki was not intended to be a legally binding agreement, and does not add legally binding human rights obligations . . ."); Thomas Buergenthal, *Democratization and Europe's New Public Order*, in *CSCE AND THE NEW BLUEPRINT FOR EUROPE* 54 (Wyatt ed. 1991); Durham, et al., *supra* note 79, at 20 n.41 ("CSCE commitments, by their terms, do not constitute formal legal commitments in the same way that treaty obligations . . . do").

The European Convention on Human Rights also speaks to freedom of conscience, but again it recognizes only a generalized right of religious freedom. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 9, para. 1, E.T.S. 5, at 52 ("Everyone has the right to freedom of thought, conscience and religion; this right includes freedom . . . either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance."). In any event, neither the Holy See nor Israel is a party to the European Convention, which provides that parties must be members of the Council of Europe. *Id.* art. 66, para. 1. Neither Israel nor the Holy See is a member of the Council.

The European Court of Human Rights has not often found states in violation of Article 9. In one interesting case, the European Court found that Greece violated Article 9 by prosecuting and convicting a Jehovah's Witness for "proselytism." See *Kokkinakis v. Greece*, 36 Y.B. Eur. Conv. on H.R. 181, 181 (Eur. Ct. on H.R. 1993).

General norms on religious tolerance also can be found in the 1993 Vienna Declaration

Thus, while the major human rights instruments do recognize a generalized right of religious freedom and a right of international travel, few if any human rights treaties actually set forth a specific, binding norm on religious pilgrimage. This surprising lack of specificity raises questions about the scope and even the existence of a right of pilgrimage in conventional human rights law. Some of those questions can be answered by reference to customary law.

There is significant state practice relating to religious pilgrimage. Saudi Arabian practice is especially instructive. Every year the Saudi government takes extraordinary steps to ensure a peaceful and orderly *Hajj*, or pilgrimage, to Muslim holy sites in Saudi Arabia. In Islam, unlike Christianity and some other religions, pilgrimage is obligatory: every able-bodied Muslim has a duty to perform the sacred journey at least once.¹⁰¹ In the era of jet travel, this means that there are more pilgrims than Saudi Arabia possibly can accommodate in any given year. As a result, the Saudi government sets quotas on the number of pilgrims that may come from each state; each sending state is entitled to one pilgrim for every 1000 residents,¹⁰² a limit that sometimes has led to complaints from people who think their country's quota is too small.¹⁰³ Other Islamic countries establish official *Hajj* Ministries within Saudi Arabia to help coordinate the travel of their own nationals to the various pilgrimage sites.¹⁰⁴ The Saudi government also requires pilgrims to obtain men-

and Programme of Action. See United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action, June 25, 1993, U.N. Doc. A/CONF.157/24 (Part I) (1993); *id.* para. 22, at 34 (calling on states to "counter" religious intolerance, including desecration of religious sites, and inviting states "to put into practice" the U.N. Declaration on religious tolerance); *id.* para. 30, at 35 (condemning religious intolerance); *id.* para. 33, at 36 (calling on states to provide education on religious tolerance).

101. See *The Cow* 2:196 (The Koran, N.J. Dawood trans., 5th rev. ed. 1990) ("Make the pilgrimage and visit the Sacred House for His sake."); see also *Libya, Iraq Stand Firm Against UN Sanctions*, JANE'S DEF. WKLY., Apr. 23, 1997, at 18, available in 1997 WL 8211622 (quoting a Libyan diplomat's view that "[t]he Hajj pilgrimage is a religious duty for all Muslims, as explicitly stipulated in the Holy Koran").

102. See, e.g., *Indonesia Will Not Apply for Haj Quota Increase*, INDONESIA NAT'L NEWS AGENCY, Sept. 11, 1996, available in 1996 WL 12281711 [hereinafter *Haj Quota Increase*] (noting that Indonesia's quota is 1/1000th of its population, or about 200,000 people); *Press Release, Saudi Arabia Announces Regulations for Upcoming Hajj*, para. 3 (Oct. 26, 1996) <http://www.saudi.net/press_release/96_spa/96_10.html#spa_10_26_Hajj> [hereinafter *Press Release*] ("All Hajj missions must comply with the number of pilgrims agreed upon in the minutes of the meetings held with the Minister of Pilgrimage within the framework of the resolutions adopted by the 17th conference of foreign ministers of the Organization of the Islamic Conference.").

103. Cf., e.g., *Haj Quota Increase*, *supra* note 102, (reporting that Indonesia's President warned that the "irresponsible people" seeking a higher quota for Indonesia "were only interested in earning easy profits from haj pilgrims").

104. See *Press Release*, *supra* note 102, para. 1 ("The Saudi Ministry of Foreign Affairs

ingitis and cholera vaccinations, a requirement that again has led to disputes with foreign pilgrims and sometimes their governments.¹⁰⁵ Administration of the *Hajj* is such an important and complex task that the Saudi government has established an entire ministry, the Ministry of Pilgrimage, to establish timetables for travel¹⁰⁶ and to promulgate regulations relating to health, safety, and welfare of pilgrims.¹⁰⁷

Saudi Arabia's quota arrangements with other Islamic countries may not amount to formal international agreements, but they are consistent with the view that there is a "right" to make the sacred journey to Mecca and the other holy places. Indeed, the Muslim's duty to travel to Saudi Arabia would seem to be incomplete without a corresponding right to do so. Certainly there are many Muslims who regard the *Hajj* as a "right,"¹⁰⁸ and those dissatisfied with Saudi administration of the *Hajj* occasionally have called for international regulation of it.¹⁰⁹ The Organization of the Islamic Conference (OIC), for its part, repeatedly has expressed satisfaction with Saudi Arabia's management of the *Hajj*, and it has insisted on the need to respect both the "sovereignty" of Saudi Arabia and the pilgrimage rites themselves.¹¹⁰ Despite this nod to Saudi sovereignty, the

and the Saudi Ministry of Pilgrimage should be notified well in advance of the names of the members of official *Hajj* delegations.").

105. See, e.g., Remi Oyo, *Nigeria/Saudi Arabia—Religion: Holier Than Thou*, INTER PRESS SERVICE, May 1, 1996, available in 1996 WL 9810351 (reporting that a "furor erupted" when Saudi Arabia barred 28,000 Nigerian pilgrims on health grounds, and quoting the administrator of the Nigerian state of Kaduna as saying that the Saudi government should not have "the exclusive right" to ban Muslims from the pilgrimage).

106. See, e.g., *Press Release*, *supra* note 102, para. 8.

107. See, e.g., *Hajj Regulations*, (visited Mar. 14, 1998) <<http://www.iad.org/books/HU-visa.html>> (setting forth rules on carrying money, travelers checks, and food); Islamic Aff. Dep't, *Safety Instructions*, (visited Mar. 14, 1998) <<http://www.iad.org/books/HU-visa.html>> (urging pilgrims to avoid walking under the sun without an umbrella, to keep valuables in certain safe places, to avoid accidents, and to respect the moral values and customs of Saudi society); see also *Press Release*, *supra* note 102, para. 4 (urging pilgrims to "take advantage of the facility of travelers checks in Saudi riyals sponsored by the Saudi Arabian Monetary Agency"); *id.* para. 5 (providing that men should be housed separately from "women who are not accompanied by a *muharram* (chaperon)").

108. See Oyo, *supra* note 105 (reporting that the administrator of the Nigerian state of Kaduna said that the Holy Places "belong, as a right to all Muslims of the world").

109. See *id.* (reporting that a local Nigerian official called for "a committee of world Muslims to take over the management of the Holy Places from the Saudi government").

110. See League of Arab States, *Communiqués from Summit Meetings in Amman and Algiers*, Nov. 11, 1987, June 9, 1988, 27 I.L.M. 1646, 1657 (1988). The Algiers Communiqué stated:

The Conference also expressed its solidarity with and support for the measures the Kingdom of Saudi Arabia might take in connection with the organization of the holy pilgrimage The summit insisted on the need to respect the holy places, the pilgrimage rites, the security and safety of pilgrims and the sovereignty of the Kingdom of Saudi Arabia.

OIC surely would protest if the Saudi government severely restricted travel to Saudi Arabia for the *Hajj*.

Other states routinely encourage, or at least tolerate, pilgrimages to religious sites within their territories. There are a variety of Hindu, Buddhist, and Muslim sites in India, and the Indian government encourages tourists to visit many of these sites.¹¹¹ Buddhist pilgrims visit holy sites in a host of Asian states, including China, Japan, India, and states in south-east Asia.¹¹² Shinto pilgrims visit a variety of pilgrimage sites in Japan.¹¹³ Christians make pilgrimages to Lourdes, France;¹¹⁴ Fátima, Portugal;¹¹⁵ Medjugorje, in Bosnia and Herzegovina;¹¹⁶ and to a number of other sites around the world.¹¹⁷ The Bible directs Jews to participate in three pil-

Id.

111. See Government of India, *Pilgrimage Sites* (visited Jan. 8, 1998) <<http://www.meadev.gov.in/tourism/temples>> (containing links to tourist information on various pilgrimage sites).

112. See, e.g., Government of India, *Tourism in India-Pilgrimage Sites-Bodhgaya*, (visited Jan. 8, 1998) <<http://www.meadev.gov.in/tourism/temples/bodhgaya.htm>> (describing arrangements to visit Bodhgaya, "the most important Buddhist pilgrimage site in the world"); Pete Hessler, *Into the Past at China's Edge*, N.Y. TIMES, May 11, 1997, § 5, at 8 (reporting on the trek Buddhist pilgrims take to the top of Jizushar, or Chicken Foot Mountain, and stating that "it is, like all China's religious pilgrimages, a journey taken mostly by elderly women who silently nursed their faith through the dark years of the Cultural Revolution").

113. See, e.g., *Thousands Dazzled*, DAILY YOMIURI, Oct. 3, 1993, at 2 (describing a rite at the Ise Shrine, a major Shinto pilgrimage site); see also Steven R. Weisman, *Ise Journal: An Ancient Shrine Is Testing a Modern Emperor*, N.Y. TIMES, Oct. 9, 1989, at A4 (describing preparations for the pilgrimage of the Emperor and Empress of Japan to the Ise Shrine).

114. See Marlise Simons, *Pilgrims Crowding Europe's Catholic Shrines*, N.Y. TIMES, Oct. 12, 1993, at A1 (reporting on the growth of pilgrimage to Lourdes and other Catholic shrines).

115. See Christina Lamb, *Well-Trodden Pilgrim Path to Fátima*, FIN. TIMES (London), July 20, 1996, at 3 (reporting that Fátima, a "small town in central Portugal," is "fast becoming Europe's most popular pilgrimage site after Lourdes," and that four million people make their way to the shrine every year).

116. See Stacy Sullivan, *Peace Brings Pilgrims Back to Village of the Virgin*, THE TIMES (London), June 25, 1996, at 14 (reporting on renewed interest in pilgrimage to Medjugorje).

117. See Kenneth B. Noble, *Pope to Sanctify Mammoth Basilica*, N.Y. TIMES, Sept. 10, 1990, at A3 (reporting that the President of the Ivory Coast, Felix Houphouët-Boigny, built a huge basilica that he regarded as a "pilgrimage center for Africa's 100 million Catholics"); Anthony W. Robins, *The Stony Side of Costa Rica*, N.Y. TIMES, Oct. 29, 1995, § 5, at 8 (describing the Basilica de Nuestra Señora de los Angeles in the city of Cartago, "a pilgrimage site that makes Cartago the Lourdes of Costa Rica"); Calvin Sims, *Buenos Aires Journal: A Saint Besieged: Heaven Knows Many Need Help*, N.Y. TIMES, Aug. 8, 1997, at A4 (reporting on a "vast pilgrimage" to pay homage to a statue of Saint Cayetano); Tom Utley, *Pilgrim's Progress in the Footsteps of a Saint*, DAILY TELEGRAPH (London), June 9, 1997, at 6, available in 1997 WL 2315661 (describing a pilgrimage from Rome to Canterbury to Northern Ireland to "celebrate the coming of the Gospels to Brit-

grimage festivals—the Feast of Unleavened Bread, the Feast of Weeks, and the Feast of Tabernacles—every year.¹¹⁸ Muslims, Jews, and Christians for centuries have made pilgrimages to religious sites in the Holy Land.¹¹⁹ Israel itself has taken a variety of measures to ensure access to holy places in Jerusalem and elsewhere in the Holy Land.¹²⁰ The breakup of the Soviet Union has led to a revival of religious pilgrimage to sacred sites in the former Soviet republics, both from abroad and within.¹²¹

Still, states sometimes do restrict and even prohibit pilgrimage. Courts in the United States, for example, regularly have turned aside lawsuits by Native Americans seeking to enjoin governmental projects that would inhibit or prevent pilgrimage to sacred sites.¹²² Russia's Parliament has

ain"); cf. Daniel Johnson, *Mother of All Mothers*, THE TIMES (London), Aug. 21, 1997, at 21 ("The great Marian shrines—Walsingham, Guadalupe, Fátima, Lourdes, and now Medjugorje—have replaced those of other saints as the principal places of pilgrimage.").

118. See *Deuteronomy* 16:16-17; *Exodus* 23:14, 23:17, 34:23.

119. Cf. Adnan Abu Odeh, *Religious Inclusion, Political Inclusion: Jerusalem as an Undivided Capital*, 45 CATH. U. L. REV. 687, 692 (1996) ("[L]ocated within the Walled City are the sacred, holy shrines, revered by everyone, whether Christian, Muslim, or Jewish.").

120. See, e.g., Interim Agreement on the West Bank and the Gaza Strip, Sept. 28, 1995, Isr.-PLO, art. 32, para. 5, 36 I.L.M. 551, 619 (1997) ("During religious events that take place three times a year and other special occasions that shall be coordinated with the Israeli authorities, Palestinians shall have the right to religious pilgrimage to the Al-Maghtas under the Palestinian flag. Safe passage will be provided from the Jericho Area to Al-Maghtas for this purpose."); Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan, Oct. 26, 1994, Annex V, para. 18, 34 I.L.M. 43, 65 (1995) ("The existing arrangements for Muslim Israeli nationals who cross into Jordan in transit to Saudi Arabia for Muslim Pilgrimage, shall continue to be applicable."). See generally Uzi Benziman, *Israeli Policy in East Jerusalem After Reunification*, in JERUSALEM: PROBLEMS AND PROSPECTS 100, 112 (Joel Kraemer ed., 1980) (describing Israeli arrangements for Muslim and Christian access to holy places in Jerusalem); Ruth Lapidoth, *Religious Freedom in Israel*, 47 CATH. U. L. REV. 441 (1998).

121. One recent example took place in Ukraine:

Reviving traditions long suppressed by Russian and Soviet rulers, thousands of Orthodox Jews descended on [Uman, a town in central Ukraine] today to celebrate the 5,758th New Year, Rosh ha-Shanah. Wearing black hats, prayer boxes and shawls, they came from as far away as Israel, the United States and France to visit the grave of Rabbi Nahman ben Simhah, the tsadik, or saint, who is the spiritual leader of the Hasidim from nearby Bratslav.

Jews Make Pilgrimage to Ukraine, N.Y. TIMES, Oct. 2, 1997, at A3; see also *In the Name of St. Nicholas, The Russian Faithful Walk*, N.Y. TIMES, June 10, 1997, at A3 (reporting on the recent revival of pilgrimage to the Russian village of Velikoretskoye, which once housed an icon of St. Nicholas the Miracle Worker).

122. See, e.g., *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983) (refusing to enjoin expansion of a ski area over a Navajo sacred site because the site was not sufficiently "central" to Navajo religious observance); *Sequoyah v. Tennessee Valley Auth.*, 480 F. Supp. 608 (E.D. Tenn. 1979) (refusing to enjoin the flooding of the Little Tennessee Valley because the sacred sites located there were not indispensable to Cherokee religious observance); see also *Tiano v. Dillard Dep't Stores, Inc.*, Nos. 96-16723, 96-16955, 1998 WL 117864, *4

proposed greater restrictions on religion in general, and on international pilgrimage in particular.¹²³ Although China has allowed some pilgrimage activity in territory it controls,¹²⁴ and it permits Muslims in China to make the *Hajj* to Saudi Arabia,¹²⁵ it also has a record of intolerance for religious freedom.¹²⁶ Israel welcomes millions of tourists a year, many of whom visit holy sites, but it also has restricted pilgrimage in some circumstances, for example by blockading Bethlehem, the birthplace of Jesus Christ,¹²⁷ and by forbidding Muslims under age thirty to make the *Hajj*.¹²⁸ Some states are concerned particularly with regulating the in-

(9th Cir. March 18, 1998) (upholding discharge of a seasonal employee who made a pilgrimage to Medjugorje in defiance of her employer, who had refused to grant her leave for the pilgrimage because it was the employer's busy season). *See generally* Mark S. Cohen, Note, *American Indian Sacred Religious Sites and Government Development: A Conventional Analysis in an Unconventional Setting*, 85 MICH. L. REV. 771 (1987); Sarah B. Gordon, Note, *Indian Religious Freedom and Governmental Development of Public Lands*, 94 YALE L.J. 1447 (1985).

123. *See, e.g.*, Proposed Law of the Russian Federation on Freedom of Conscience and Religious Belief, art. 21, *reprinted in* Durham et al., *supra* note 79, at 58-59 (providing that religious groups may "invite" foreigners to participate in "pilgrimages," but that entry may be refused if, *inter alia*, the foreigners' activities "contradict the standards of public morality in the Russian Federation"). The law was vetoed by President Yeltsin. *See* Harold J. Berman, *Religious Rights in Russia at a Time of Tumultuous Transition: A Historical Theory*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE 285, 297-300 (Johan D. van der Vyver & John Witte, Jr. eds., 1996). More recently, however, President Yeltsin signed legislation imposing restrictions on "nontraditional" religions in Russia. *See* Daniel Williams, *Faith-Curbing Bill Becomes Law in Russia; Restrictions on Religion Enacted in Face of Global Criticism*, WASH. POST, Sept. 27, 1997, at A16.

124. *See, e.g.*, Edward A. Gargan, *Chinese Are Said to Restore Shaky Calm in Tibet*, N.Y. TIMES, Feb. 4, 1988, at A15 (noting that China permitted a Buddhist festival that attracted many pilgrims).

125. *See* HOUSE COMM. ON FOREIGN AFFAIRS & SENATE COMM. ON FOREIGN RELATIONS, 103D CONG., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1993 612 (Joint Comm. Print 1994). There are about 17 million Muslims in China. *See id.*

126. *See, e.g.*, Secretary of State Madeleine K. Albright, U.S. Dep't of State, Special Press Briefing, Remarks on the 1996 Annual Reports on Human Rights Practices, Jan. 30, 1997 <gopher://gopher.state.gov> (asserting that religious persecution and intolerance has "increased" in China).

127. *See* Laurie Copans, *UPDATES With Lifting of Blockade*, Agence France-Presse, Aug. 27, 1997, available in 1997 WL 13384537 (reporting that the Vatican called on Israel to lift the blockade).

128. *See* U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1996: ISRAEL AND THE OCCUPIED TERRITORIES § 2.d (1997) <http://www.state.gov/www/global/human_rights/1996_hrp_report/israel.html>. The report stated:

In 1996 the Government [of Israel] again permitted Muslim citizens over 30 years of age to perform the religious pilgrimage to Mecca, but it denied permission to Muslim citizens under 30 years of years [sic] of age on security grounds. The Government asserts that travel to Saudi Arabia, which is still in a state of war with Israel, is a privilege and not a right.

Id.; *see also* HOUSE COMM. ON FOREIGN AFFAIRS & SENATE COMM. ON FOREIGN

gress of pilgrims: Saudi Arabia regulates the *Hajj* with pilgrim quotas, vaccination certificates, and the like. Other states seem more concerned with regulating the egress of pilgrims: Vietnam, for example, imposes special restrictions on those wishing to make the *Hajj*.¹²⁹

There may be some reason to doubt, then, that there is a "general and consistent"¹³⁰ state practice of permitting, much less facilitating, religious pilgrimage. Still, the enormous volume of pilgrimage worldwide seems more impressive than individual states' restrictions, many of them partial, on pilgrimage. To constitute customary law, it is not necessary that this practice be universal or that states actively promote pilgrimage.¹³¹ Moreover, there does appear to be a "general and consistent practice" of both permitting and actively promoting pilgrimage within the Islamic world.¹³² The International Court of Justice has recognized the possibility of this sort of regional or special customary law.¹³³ In any event, whether or not there is a general and consistent practice of promoting pilgrimage, there clearly seems to be a general and consistent practice of permitting it, subject to restrictions designed to protect the health and safety of pilgrims and the security and territorial integrity of the state.

Even if there is a general and consistent state practice of permitting pilgrimage, there is more reason to doubt that this practice is accompanied by a sense of legal obligation, or *opinio juris*.¹³⁴ Customary law re-

RELATIONS, 103D CONG., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1993: ISRAEL AND THE OCCUPIED TERRITORIES § 2.c, at 1197 (1994) (reporting that the prohibition on the *Hajj* applied only to Muslim men under age 30).

There also has been debate in Israel about whether to require pilgrimage groups to be accompanied by Israeli guides. According to one report, "Roman Catholic spokesmen have argued that it is spiritual leaders who should lead a group on a pilgrimage," while one Israeli official has argued that "Israel has abdicated its sovereignty over Christian holy places by allowing Christian groups to visit without Israeli guides." Haim Shapiro, *PM Aide: Sovereignty Over Christian Holy Sites Lost*, JERUSALEM POST, Dec. 15, 1994, at 12, available in 1994 WL 9863638.

129. In Vietnam, "[b]oth law and regulation provide for the right of all citizens to obtain an exit permit," but the law makes an exception for "[m]embers of the small Muslim community seeking to make the [H]ajj" and certain other groups. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 1996: VIETNAM, § 2.d (1997) <http://www.state.gov/www/global/human_rights/1996_hrp_report/vietnam.html>.

130. RESTATEMENT, *supra* note 18, § 102(2) (stating that "[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation").

131. See *id.* § 102 cmt. b.

132. Cf. Mason, *supra* note 59, at 637 (describing the *Hajj* as the "clearest case for the protection of pilgrimage under the right to freedom of thought, conscience, and religion").

133. See *Asylum* (Colom. v. Peru), 1950 I.C.J. 266, 276-77 (Nov. 20).

134. See RESTATEMENT, *supra* note 18, § 102, cmt. c (maintaining that customary law requires both state practice and *opinio juris*).

quires both practice and *opinio juris*.¹³⁵ States that admit pilgrims still require them to satisfy the same passport, visa, and vaccination requirements as any other visitors, and states routinely regard the issuance of a visa to a foreign national as a decision falling squarely within the discretion of the state, not a matter of right for the traveler.¹³⁶ On this view, an alien's entry into a state's territory is generally a privilege, not a right. Indeed, states even have been slow to implement the undisputed human right to leave one's own country, much less any right to enter another.¹³⁷ To be sure, Muslim states often do speak of the *Hajj* in terms of right, not privilege,¹³⁸ again raising the possibility that there is a regional or special customary law rule for the Islamic world. Still, even Saudi Arabia's extensive preparations for the *Hajj* are probably motivated more by a sense of religious than legal obligation. Some states even have made explicit their view that there is no right of religious pilgrimage to foreign countries. Israel, for example, has taken the position that the *Hajj* is a "privilege and not a right," at least as long as Israel is in a state of war with Saudi Arabia.¹³⁹ Of course, Israel and other skeptics could be dismissed as persistent objectors to an existing, or emerging, right of religious pilgrimage.

On balance, it appears fair to conclude that most states continue to maintain a right to exclude aliens, including pilgrims. With the exception of Saudi Arabia, there are not many states that view visa applications

135. See *id.*

136. Cf. ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 77-78 (1971) (expressing skepticism that states' long-standing willingness to accept tourists reflects any sense of legal obligation to do so).

137. See GOODWIN-GILL, *supra* note 67, at 29 (noting that while international law recognizes some right to travel, "State practice in the municipal sphere tends to reflect a claim of absolute discretion, rather than any restrictive rule of general international law"); cf. FREEDMAN, *supra* note 62, at 17-25 (describing travel policies and restrictions of nine different states); INGLÉS, *supra* note 74, at 4 (finding that only a minority of states recognize a right to leave in their constitutional texts); Jean, *supra* note 86, at 33 ("Il n'y a pas . . . de liberté fondamentale d'entrée.").

138. See, e.g., Paul Lewis, *U.N. Ignores U.S. Call to Rule that Iraqi Flight Broke Sanctions*, N.Y. TIMES ABSTRACTS, Apr. 17, 1997, at A1, available in 1997 WL 7993452 (quoting Iraq's Saddam Hussein as asserting that Iraq had only "exercised its inherent right to use its civilian aircraft" when it flew Iraqi Muslims to Saudi Arabia for the *Hajj*, and reporting that Saddam Hussein warned that he "reserve[d] the right to fly planes again"); *Plane Flies to Jeddah*, APS DIPLOMAT RECORDER, Apr. 20, 1996, available in 1996 WL 8934515 (quoting Libya's Qadhafi as saying his people "have the right to make the pilgrimage"); *id.* (quoting an Arab diplomat as saying that "Qadhafi has the religious right to send pilgrims on Libyan planes, but is wrong to defy the international community").

139. See U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1996: ISRAEL AND THE OCCUPIED TERRITORIES § 2.d (1997) <http://www.state.gov/www/global/human_rights/1996_hrp_report/israel.html>.

from pilgrims more favorably than those from ordinary tourists. Within the Islamic world, there clearly is a sense of obligation attached to the *Hajj* that might suggest the formation of regional or special custom. More-over, it is possible that a right of pilgrimage might emerge in customary law. The fact that pilgrimage is on the increase worldwide is likely to lead to more frequent claims of individual right and corresponding state obligation.

Even if there is a right of pilgrimage in customary international law, it probably does not rise to the level of a peremptory norm, or *jus cogens*.¹⁴⁰ It is not likely that a very large majority of states recognizes such a norm, as is required of *jus cogens*.¹⁴¹ States and international organizations sometimes have behaved as if no such norm exists. Most notably, the U.N. Security Council has imposed severe travel-related restrictions on Libya and Iraq, and those restrictions have prevented many residents of those states from participating in the *Hajj*.¹⁴² Iraq has argued that such resolutions are illegal,¹⁴³ and Colonel Qadhafi has said that his people "have the right to make the pilgrimage" notwithstanding the sanctions.¹⁴⁴ While a growing number of commentators have weighed in on the existence and scope of the World Court's power to review the validity of Security Council resolutions,¹⁴⁵ and the Court has arguably exercised such a power already,¹⁴⁶ the Court thus far has declined to invalidate any Secu-

140. See Vienna Convention, *supra* note 8, art. 53, at 344 (defining a peremptory norm or *jus cogens* as one "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character").

141. *Cf. id.* (providing that a *jus cogens* norm is one "accepted and recognized by the international community of states").

142. See, e.g., S.C. Res. 748, U.N. SCOR, 3063d mtg., at 2, para. 4(a), U.N. Doc. S/RES/748 (1992) (deciding that all states shall "[d]eny permission to any aircraft to take off from, land in or overfly their territory if it is destined to land in or has taken off from the territory of Libya, unless the particular flight has been approved on grounds of significant humanitarian need" by a sanctions committee); S.C. Res. 670, U.N. SCOR, 2943d mtg., at 2-3, paras. 3-7, U.N. Doc. S/RES/670 (1990) (imposing aviation restrictions on Iraq).

143. See Lewis, *supra* note 138, at A1 (reporting that Saddam Hussein described the restriction on Iraqi pilgrimage flights as "illegal").

144. *Plane Flies to Jeddah*, *supra* note 138.

145. See, e.g., Jose E. Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1 (1996); Thomas M. Franck, *The "Powers of Appreciation": Who Is the Ultimate Guardian of UN Legality?*, 86 AM. J. INT'L L. 519 (1992); Antonio F. Perez, *The Passive Virtues and the World Court: Pro-Dialogic Abstinence by the International Court of Justice*, 18 MICH. J. INT'L L. 399 (1997); W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83 (1993); Geoffrey R. Watson, *Constitutionalism, Judicial Review, and the World Court*, 34 HARV. INT'L L.J. 1 (1993).

146. See Watson, *supra* note 145, at 14-28 (discussing three cases in which the World

rity Council resolution as a violation of *jus cogens*.¹⁴⁷ On the other hand, both Libya and Iraq have defied the Security Council's sanctions by sending pilgrims by air to Saudi Arabia,¹⁴⁸ and while the Security Council sometimes has condemned these acts,¹⁴⁹ it more recently has refrained from criticizing Iraqi pilgrimage flights.¹⁵⁰ Still, there is obvious disagreement, both inside and outside the Security Council, about the validity of the resolutions; this disagreement itself suggests that a *jus cogens* norm on pilgrimage has not yet emerged.¹⁵¹ This reasoning is of course circular, but so is the concept of *jus cogens*: a norm is only peremptory if virtually all states treat it as such.

In sum, there does not appear to be a clear conventional or customary law rule establishing a right of religious pilgrimage. The treaties and other instruments surveyed above are, at best, inconclusive, and if anything tend to support the view that no such rule exists. In human rights instruments, the right to religious freedom is usually cast in general terms; the right to leave a country is not accompanied by a right to enter another; and there is explicit provision for entry of refugees without making any such provision for pilgrims. If there is a right of pilgrimage, it is more likely found in customary law, and even then it seems most likely a regional or special rule, applicable foremost to the Islamic world. Whether or not there is such a right, it is clearly not a *jus cogens* norm, at least not yet.

III. CONCLUSION

It would thus appear that the pilgrimage provisions of the Fundamental Agreement are quite consistent with human rights law. There may be a special customary rule establishing a right of Muslims to make the *Hajj* to the holy places in Saudi Arabia, but that rule would have no direct

Court has exercised judicial review).

147. See Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114, 126-27 (Provisional Measures Order of April 14).

148. See Lewis, *supra* note 138, at A1; *Plane Flies to Jeddah*, *supra* note 138.

149. See, e.g., *Libya, Iraq Stand Firm Against UN Sanctions*, JANE'S DEF. WKLY., Apr. 23, 1997, at 18, available in 1997 WL 8211622 (noting that the Council accused Libya of four violations and Iraq of one violation, and that the "council's sanctions committee has reprimanded both countries and warned them against violations").

150. See Lewis, *supra* note 138, at A1 (reporting that the Council refused to deliver "even the mildest rebuke to Iraq" after China and Egypt "took a firm stand against criticizing Baghdad").

151. Cf. RESTATEMENT, *supra* note 18, § 702 (omitting freedom of travel, religion, and pilgrimage from a list of norms of customary human rights law).

bearing on interpretation of the Fundamental Agreement because its terms are limited to Christian pilgrimage.

Human rights law does suggest, however, that the Fundamental Agreement should not be interpreted as affording fewer rights of pilgrimage to Muslims and members of other religions than to Christians. It may not be clear whether there is a right of international pilgrimage in human rights law, but there is clearly a rule forbidding discrimination on the basis of religion.¹⁵²

Should human rights law require states to accept pilgrims? Certainly there is nothing in human rights law that *forbids* states to enter into bilateral or multilateral agreements requiring them to accept pilgrims for temporary visits to religious shrines. Such an obligation could of course be subject to restrictions designed to protect the health and safety of pilgrims and the security of the state. Israel itself has made useful steps in this direction in its agreements with the PLO and with Jordan.¹⁵³ Similarly, nothing in human rights law would forbid the Security Council from tailoring its sanctions resolutions more narrowly in the future so as to avoid interfering with religious pilgrimage.

By and large, it would appear that states have an interest in “favoring” pilgrimage, much as the Fundamental Agreement envisions. There are noble reasons to do so: pilgrimage is an important expression of religious devotion, and interaction between local nationals and foreign pilgrims may promote international understanding—though “understanding” itself does not always promote peace. There are also mundane reasons to favor pilgrimage: pilgrims, like ordinary tourists, are good for the economy of the receiving state. To be sure, pilgrimage carries increased risk of illegal immigration, capital flight, and, perhaps, degradation of religious shrines themselves. Still, these risks can be managed by controlling the volume and flow of pilgrimage, as some states do already.

Ironically, international pilgrimage may not be recognized as a human right until states band together to regulate it. As long as pilgrims have free access to holy sites in much of the world, they (and their governments) are unlikely to give much thought to the existence of a right to pilgrimage. If states become so overwhelmed by pilgrims that they cannot admit them all, then those pilgrims denied access (and their governments) are more likely to complain of a violation of a “right.” The growing claims of right to make the *Hajj* demonstrate this point. If one

152. See *supra* notes 79-100 (describing non-discrimination norms in various human rights instruments).

153. See *supra* note 120 (describing pilgrimage provisions in Israel's agreements with the PLO and Jordan).

looks for a right of pilgrimage today, one most likely finds a regional or special customary rule obliging the Saudi government to admit a limited number of Muslim pilgrims for the *Hajj* every year.

It is too early to tell whether the millennium will overwhelm Israel, France, Portugal, or the Vatican itself with pilgrims.¹⁵⁴ Even if no pilgrims are turned away from those states in the year 2000, it is likely that sometime during the *next* millennium, the demand for pilgrimage will exceed the capacity of some states to host pilgrims. When that time arrives, more states will doubtless negotiate pilgrimage quotas resembling those already established by the Saudi government. Such quotas may or may not be coupled with an explicit acknowledgment of a "right of pilgrimage." Broader international regulation of pilgrimage will strengthen the argument that there is a general and consistent state practice of admitting pilgrims out of a sense of legal obligation. The law of religious pilgrimage is itself on a pilgrimage, on a journey into the corpus of human rights law. Like most pilgrimages, the voyage will be long, slow, and, ultimately, rewarding.

154. The Vatican's preparations for pilgrimage in the Jubilee Year are proceeding apace. As this Article was going to press, the Holy See made public an important new Vatican document entitled "Pilgrimage in the Great Jubilee of the Year 2000." Among other things, the document is intended to "help all pilgrims and pastoral leaders of pilgrimages, so that in the light of the Word of God and the secular tradition of the Church, all may participate more fully in the spiritual riches of undertaking a pilgrimage." VIS Press Release, *Pilgrimage in the Great Jubilee Year 2000* (April 28, 1998) <http://www.vatican.va/news_services/vis/dinamiche/e6_en.htm>.

When presenting the document on pilgrimage, the President of the Pontifical Council, Cardinal Giovanni Cheli, said that "visits to shrines, particularly pilgrimages, constitute part of the vitality of the Church, a privileged place of evangelization, a truly efficient means of renewal in the sacraments and a driving force in the building of Church communities." *Id.* Archbishop Francesco Gioia, Secretary of the Council, added that pilgrimage is "a way towards a very symbolic objective. A way is made to the shrine which is considered 'the House of the Lord.'" *Id.* Underscoring the importance of the new document on pilgrimage, Vatican officials noted that it had been the "fruit of several years' effort" and that "the last Vatican paper dedicated to pilgrimages had been produced in 1936." Lynne Weil, *Vatican Document Explores Meaning of Pilgrimages*, CATH. STANDARD, Apr. 30, 1998, at 5.

